PENTADBIR TANAH DAERAH PETALING

v.

SWEE LIN SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: B-01-147-1996]
12 JANUARY 1998

LAND LAW: *Acquisition of land - Compensation - Building constructed on land without planning permission - Whether land owner should be compensated for loss of building - Land Acquisition Act 1960, First Schedule, para 1(3)(b)*

This was the appellant's appeal against the decision of the High Court awarding the respondent the sum of RM440,000 as compensation for a warehouse located on the respondent's land pursuant to an acquisition of the said land under the Land Acquisition Act 1960 ("the Act"). The warehouse was built illegally against the express conditions of use of the land and in the absence of planning permission.

Held:
Per Gopal Sri Ram JCA

[1] Paragraph 1(3)(b) of the First Schedule of the Act excludes from consideration a building built unlawfully upon land that is being acquired. A party should not be permitted to take advantage of his own breach. A land owner who has erected a building on his land contrary to law should not receive any benefit from it from the acquiring authority.

[2] The learned judge was wrong in directing his mind solely to ss. 20 and 21 of the Act. Although the grant or refusal of compensation is usually a discretionary exercise, in this case there had been a serious breach of principle warranting intervention by this court.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi untuk memberi pampasan kepada responden sejumlah RM440,000 bagi sebuah gudang yang terletak di atas tanah kepunyaan responden yang diambil di bawah Akta Pengambilan Tanah 1960 ("Akta tersebut"). Gudang tersebut telah dibina oleh responden secara haram dan melanggari syarat-syarat nyata penggunaan tanah serta tanpa kebenaran dari pihak berkuasa.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perenggan 1(3)(b) dalam Jadual Satu Akta tersebut mengecualikan bangunan yang dibina secara haram di atas tanah yang diambil daripada sebarang pertimbangan untuk pampasan. Seseorang tidak dibenarkan mengambil peluang daripada kesalahan sendirinya. Tuan tanah yang telah membina bangunan di atas tanah dengan melanggari undang-undang tidak patut menerima apa-apa faedah daripada pihak berkuasa yang mengambil tanah di bawah Akta tersebut.

[2] Hakim Mahkamah Tinggi telah melakukan kesilapan dalam keputusannya dengan hanya berdasarkan kepada ss. 20 dan 21 Akta tersebut. Walaupun pemberian atau penolakan pampasan adalah di bawah bidangkuasa hakim, namun pelanggaran syarat-syarat penggunaan tanah yang berlaku dalam kes ini adalah serius dan memerlukan campurtangan mahkamah.

[Rayuan dibenarkan.]

Case(s) referred to:
Alghussein Establishment v. Eton College [1988] 1 WLR 587 ***(refd)***
New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France [1919] AC 1 ***(refd)***
Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21 ***(foll)***

Legislation referred to:
Land Acquisition Act 1960, ss. 12, 20, 21, First Schedule para 1(3)(b), Form K National Land Code 1965, ss. 53(2), 115(1), (4), 125, 127

For the appellant - Ahmadi Hj Asnawi SLA
For the respondent - B Thangaraj; M/s Thangaraj & Assoc

[Appeal from High Court, Shah Alam; Civil Application No: 15-44-90]

Reported by Farah Naim

JUDGMENT

Gopal Sri Ram JCA:

The appellant who is the Land Administrator, District of Petaling, being dissatisfied with the award of compensation made by the learned judge in the court below in respect of a building – a warehouse situated on the respondent's land acquired by appellant, has appealed to us.

The facts of the case have been adequately dealt with by the learned judge in his judgment. There is no need to repeat them at length here.

Briefly, the respondent was, until the acquisition declaration, the registered proprietor of a piece of land in the District of Petaling ("the subject property"). The subject property was under Mukim title. It is on level ground. The express condition of use was for agriculture only. The respondent, on 18 December 1981, applied for planning permission to construct a warehouse on the subject property. However, until the date of acquisition of the subject property in March 1985 there was no response from those entrusted by law to consider and deal with applications for planning permission. The learned Legal Adviser of Selangor concedes that he is unaware of the reasons for the absence of such response. I may add for completeness that Form K under the Land Acquisition Act 1960 ("the Act") was issued by appellant on 22 January 1987.

When the judge came to assess the compensation there was some argument about whether respondent ought to be compensated for loss of the warehouse as well. It was argued by the appellant in the court below that no account should be taken of the warehouse and that no compensation should be given in respect of it. For the respondent it was contended that compensation ought to be awarded even though it was a warehouse that had been built on agricultural land.

The learned judge agreed with respondent's submission. He then made an award of RM440,000 for the warehouse. The learned judge also confirmed the award of RM260,000 earlier made by appellant. Against this latter order there is no appeal.

The learned Legal Adviser argued before us that the learned judge was wrong in making an award for the warehouse by relying on ss. 20 and 21 of Land Acquisition Act 1960. These sections provide as follows:

20. Where on any scheduled land in respect of which a Certificate of Urgency has been issued there is any building the Land Administrator shall, upon taking formal possession, as provided in section 22 of the land not built upon, serve notices in Form J upon:

(a) the occupier of the building requiring that he vacate the building within such period, not exceeding sixty days from the date of the notice, as may be specified therein;

(b) the owner of the building making an offer of compensation in respect of the building:

(i) where the building is a permanent structure, of the value of the building as it stands;

(ii) where the building is a temporary construction, or is otherwise capable of removal and re-erection, of the value of the building or the cost of its removal and re-erection.

21(1) Where the owner of a building accepts the offer of compensation under s. 20 the Land Administrator:

(a) may take possession of such building on the expiration of the period prescribed in the notice in Form J; or

(b) may, upon its removal by the proprietor, pay the cost of its removal and re-erection.

(2) Where the owner of a building does not accept an offer of compensation under s. 20 of the Land Administrator:

(a) where the building is a permanent structure, shall not take possession thereof until he has obtained a valuation of such building by a competent valuer; or

(b) where the building is of temporary contruction, or is otherwise capable of removal and re-erection, may himself remove and re-erect such building.

The learned Legal Adviser submitted that these two sections have relevance to the issues raised because there was an absence of Certificate of Urgency of which ss. 20 and 21 speak of. I think the learned Legal Adviser is correct in this argument. I agree with his submission that assessment should be directed with s. 12 of the Act alone in mind. Section 12 provides:

12(1) On the date appointed under section 10(1) the Land Administrator shall make full enquiry into the value of all scheduled lands and shall be as soon as possible thereafter assess the amount of compensation which in his opinion is appropriate in each case, according to the consideration set out in the First Schedule.

(2) The Land Administrator shall also enquire into the respective interests of all persons claiming compensation or who in his opinion are entitled to compensation in respect of the scheduled land, and into the objections, if any, made by any interested person to the area of any scheduled land.

(3) The Land Administrator may for a sufficient cause to be recorded by him in writing postpone any enquiry or adjourn any hearing of an enquiry from time to time.

Our attention has been drawn by the learned Legal Adviser to the matters that ought to be taken into account by a court when deciding the quantum under the Act. He has referred us to para. 1(3)(b) of the First Schedule which reads as follows:

1(3) If the market value of any scheduled land has been increased, or is currently increased, in either of the following ways, such increase shall be disregarded:

(a) ...

(b) an increase by reason of the use of the land, or of any premises thereon, in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health.

Encik Ahmadi, the learned Legal Adviser, has argued that the warehouse, in the admitted absence of planning permission, was illegally located on subject property. The respondent, he argues, ought not to benefit from his own wrong. He has further submitted that para. 1(3)(b) of the First Schedule when properly interpreted excludes from consideration a building built unlawfully upon land that is being acquired. I am in full agreement with his submission.

Quite apart from the construction of para. 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach. See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

But as I have said, the principle is of universal application. In the context of the present case, that principle produces the following result. A land owner who has erected a building on his land contrary to law ought not to receive any benefit from it from an acquiring authority under the Act.

Mr. Thangaraj, of counsel for the respondent seeks to repel these arguments by contending that the Act is a special law and that breach of any other law ought not to be considered relevant. These arguments are addressed specifically in response to Encik Ahmadi's reliance on certain provisions of National Land Code 1965 ("the Code"). These are ss. 53(2), 115(1) and (4), 125 and 127 of the Code which read as follows:

> 53(2) All land to which this section applies which is at the commencement of this Act:
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> (a) country land, or
>
> (b) town or village land held under land office title,
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> shall become subject at that commencement to an implied condition that it shall be used for agricultural purposes only:
>
> Provided that this condition:
>
> (i) shall not prevent –
>
> (a) the use of any part of the land for any purpose for which it could (under section 115) be lawfully used if it were subject instead to the category 'agriculture', or
>
> (b) the continued use of any part thereof for any industrial purpose for which it was lawfully used immediately before the commencement of this Act; and
>
> (ii) shall not apply to any part of the land which is occupied by or in conjunction with –
>
> (a) any building lawfully erected before that commencement, or
>
> (b) any building erected after the commencement, the erection of which would (under section 115) be lawful if the land were subject instead to the category 'agriculture'.
>
> 115(1) Where any alienated land is subject by virtue of any provision of this Act to the category 'agriculture', the following implied conditions shall, subject to subsection (3), apply thereto –

(a) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes specified or referred to in subsection (4);

(b) that *bona fide* commencement of cultivation of the land shall be made within twelve months of the relevant date;

(c) that the whole area of the land, other than any part thereof –

(i) occupied by or in conjunction with a building (whatever erected) used for one or more of the purposes specified or referred to in subsection (4), or

(ii) used for any of the purposes mentioned in paragraph (e) of that subsection, or any other purpose which the State Authority may specially authorise, shall be brought fully under cultivation within three years of the relevant date;

(d) that the area referred to in paragraph (c) shall be maintained and cultivated according to the rules of good husbandry; and

(e) that the said area shall be continuously cultivated:

Provided that the condition specified in paragraph (e) shall be regarded as complied with in the case of any area so long as any period during which less than the whole thereof is cultivated does not exceed 12 months.

(2) ...

(3) ...

(4) The purpose referred to in paragraph (a) of subsection (1) are the following –

(a) the purposes of a dwelling-house for the proprietor of the land or any other person lawfully in occupation thereof, or for the servants thereof, or any persons employed for agricultural purposes by the proprietor or any other such person:

Provided that the dwelling house for the proprietor of the land or any other person lawfully in occupation thereof shall not occupy more than one-fifth of the whole area of the land or two hectares, whichever is the lesser;

(b) the purpose of agriculture;

(c) the purpose of extracting or processing law material from any agricultural of such land;

(d) the purpose of preparing for distribution any such material or produce, or any honey-bees, livestock or reptiles kept or bred on such land, or the produce of such livestock or aquaculture on such land;

(e) the purposes of providing educational, medical, sanitary or other welfare facilities, including (so far as they are provided primarily for use by persons employed on the land) facilities for the purchase of goods and other commodities;

(f) any purposes which the State Authority may prescribe for the purpose of this section by rules under section 14;

(h) any purposes incidental to a purpose falling within any of the preceding paragraphs.

125(1) A breach of a condition requiring continuous performance shall arise so soon, and continue so long, as the condition is not complied with.

(2) A breach of a condition subject to a fixed term shall arise –

(a) in the case of a condition requiring the doing of any act within any time (being the time specified threin, or that time as extended under section 107) upon the expiry of that time without the act having been done;

(b) in the case of a condition requiring any act to be refrained from until any time, upon the doing of that act before that time.

127(1) Upon any breach of any condition to which any alienated land is for the time being subject –

(a) the land shall become liable to forfeiture to the State Authority, and

(b) except in a case where a fine is imposed under subsection (1A), or where action for the purpose of causing the breach to be remedied is first required to be taken under section 128, the Land Administrator shall proceed with the enforcement of the forfeiture in accordance with the provisions of section 129.

I must express my disagreement with the submission of Mr. Thangaraj. In *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, the Federal Court held that a tenancy granted in contravention of the conditions imposed on the use of the land was illegal because it contravened s. 125 of the Code. Raja Azlan Shah Acting CJ Malaya, when delivering the judgment of the court said (at p. 25):

> In the present case, the breach of the express condition is wilful, if not, contumacious. There is a clear intention on the part of the appellants to use the subject-matter of the agreement i.e. the land on which the factory was created, for an unlawful purpose. The object of the express condition is that the land must be cultivated with rubber and pineapple; the category of land use is agricultural, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use. The appellants are deemed to have been aware of the illegality of the agreement when they entered it and therefore section 66 of the Contracts Act cannot assist them.

On an application of the proposition set out in *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. (ibid)*, I am satisfied that the construction of the warehouse on the subject property in the present case certainly amounts to an unlawful act. It therefore comes within the purview of para. 1(3)(b) of the First Schedule to the Act. In my judgment, the respondent ought not therefore to have any compensation for the building.

The learned judge was, in my opinion, clearly wrong in directing his mind solely to ss. 20 and 21 of the Act. Although grant or refusal of compensation is usually a discretionary exercise, in this case, there has been a serious breach of principle warranting intervention by this court.

For the reasons already given, I would allow this appeal.

That now brings me to the cross appeal. Encik Thangaraj told this court that arguments on the cross appeal are limited only to the learned judge's refusal to allow interest. It is well settled that the power to award of refuse interest is one of pure discretion. I am in agreement with the submission of Encik Ahmadi that this is not an appropriate case for appellate intervention. I would, therefore, dismiss the cross appeal.

Siti Norma Yaakob JCA:

I agree with the judgment of the learned chairman.

Denis Ong JCA:

I concur with the judgment delivered by the learned chairman.

Court:

We will now hear argument on costs.

En Ahmadi:

I leave the question of costs to the court.

En Thangaraj:

I submit that there ought to be no order as to costs on the appeal and cross appeal.

ORDER

The appeal is allowed. There shall be no order as to the costs of the appeal. The order of the judge awarding RM440,000 as compensation for the warehouse is set aside. The cross appeal is dismissed. No order as to costs in this court. The order as to costs in the court below is to remain.